

No. 20219

IN THE
United States Court of Appeals
For the Ninth Circuit

PALMBERG CONSTRUCTION Co.
an Oregon corporation,
Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S PETITION FOR REHEARING

RYAN, CARLSON, BUSH,
SWANSON & HENDEL
Attorneys for Petitioner

Office and Post Office Address:
545 Henry Building
Seattle, Washington 98101

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ON THE QUESTION OF INTEREST

In its decision in the above-entitled matter dated April 5, 1967, this Honorable Appellate Court reversed the judgment of the jury entered against the Simpson Timber Company (Cl. Tr. p. 244). In this decision, this Appellate Court concluded the \$16,187.00 Simpson Timber Company had tendered to the Palmberg Construction Co. was, in fact, the amount due to Palmberg under the existing contract:

"Here, the \$16,187.00 represented exactly the re-

maintaining amount owing and due Palmberg under the payment formula fixed in the contract" (Decision p. 10).

This Appellate Court then further concluded:

"That the sum represented a liquidated or determinable claim upon which interest should have been granted" (Decision p. 10).

Simpson Timber Company now petitions for a rehearing of this Appellate Court's conclusion that its tender of \$16,187.00 would not stop the running of interest thereon, or that interest would be due on that amount if, in fact, a jury should ultimately find it due and owing.

Grounds

I. This Appellate Court at page 11 of its decision has indicated Simpson Timber Company is precluded from arguing it made an unconditional tender to Palmberg of the \$16,187.00 because of a stipulation (actually an Admitted Fact) contained within the Pre-Trial Order. Simpson respectfully submits:

a. Notwithstanding the Admitted Fact, the uncontroverted evidence at the time of trial was that the tender made by Simpson on November 6, 1961 (Pl.'s Ex. 18) was unconditional. As this Appellate Court has pointed out in its decision, the trial court, until final judgment, remains free to interpret, alter, modify or even reverse pre-trial orders, summary judgments, etc. (Decision p. 8). Accordingly, the trial court was correct in holding that the tender made by Simpson was unconditional, and in denying interest to Palmberg. Its judgment in so doing should be affirmed.

b. The Admitted Fact referred to by this Appellate

Court in its decision does not in its terms refer to the tender relied upon by Simpson (Pl.'s Ex. 18). Simpson was not precluded from making both a conditional and unconditional tender. The evidence submitted at the time of trial was that an unconditional tender was made (Pl.'s Ex. 18). As a matter of law, the unconditional tender stopped the running of interest.

II. The petitioner, Simpson Timber Company, respectfully submits the \$16,187.00 never was a liquidated amount for the reasons:

a. Simpson only admitted the \$16,187.00 was the *maximum* amount it *could* owe under the contract.

b. Palmberg did not agree that \$16,187.00 was either the actual or the maximum amount due under the contract. It introduced a large volume of testimony at the time of trial in an effort to prove Simpson's calculation of the contract price did not correctly establish the actual or maximum amount due under the contract.

c. Palmberg's principal thrust in order to obtain a judgment against Simpson was that the contract should be ignored, and that it should receive compensation on a *quantum meruit* basis. Palmberg should not be allowed to take such a position and at the same time claim it is entitled to interest under a contract which it attempts to avoid.

III. The issues submitted to the jury in the cause, as set out in the Pre-Trial Order, specifically negate the argument that either party agreed the \$16,187.00 was due and owing. Those issues in the Pre-Trial Order are:

Issues of Fact

No. 32. Is the plaintiff entitled to additional compensation in addition to that already paid it for the work performed?

No. 33. If so, what is the total amount presently due plaintiff, and is plaintiff entitled to sales tax in addition to that amount, or is sales tax included therein?

(Cl. Tr. p. 178).

The issue in the lawsuit was whether or not Palmberg was entitled to more compensation than it had already been paid. It would be contrary to law and inequitable to allow Palmberg to recover interest on additional compensation tendered to it by Simpson in an effort to terminate the controversy.

Respectfully submitted,

RYAN, CARLSON, BUSH,
SWANSON & HENDEL

Attorneys for Petitioner

CERTIFICATE

I certify that in my judgment this Petition for Rehearing on the question of interest is well founded and is not interposed for delay.

DALE E. KREMER